IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HAY GROUP, INC.,
Plaintiff

v.

NO. 02-MC-252 and 02-MC-253
(consolidated)

E.B.S. ACQUISITION CORP. and
PRICEWATERHOUSECOOPERS L.L.P.,
Defendants

MEMORANDUM AND ORDER

McLaughlin, **J.** March 4, 2003

On November 27, 2002, this Court ordered the defendants to comply with the plaintiff's arbitral subpoenas to produce documents. On December **17**, 2002, the Court imposed a specific regime for production that narrowed the materials to be produced and protected confidential information. The defendants move to stay the last step of the December order, which requires actual handover of documents to the plaintiff, while their appeals of both orders are pending before the Third Circuit. The Court will deny their motions for a stay.

I. Background

The underlying arbitration involves a dispute between plaintiff Hay Group ("Hay") and its ex-employee David Hofrichter regarding the noncompete agreement Hofrichter signed when he left

Hay. Hofrichter went to work for part of PricewaterhouseCoopers ("PwC") that later became part of **E.B.S.** Acquisition ("E.B.S."). Hay alleges Hofrichter violated the agreement by funneling Hay clients and personnel to PwC/E.B.S.

To gather information about Hofrichter's alleged breach of the noncompete agreement, Hay subpoenaed documents in July 2002 from defendants PwC and E.B.S. for the arbitration. When defendants failed to produce the documents, Hay moved **to** enforce compliance with the subpoenas on October 11, 2002. This Court held oral argument on Hay's motions for compliance on November 22, 2002.

On November 27, 2002, this Court granted Hay's motion for enforcement. It decided that Section 7 **of** the Federal Arbitration Act (FAA) empowered arbitrators to issue subpoenas for the production **of** documents before an arbitration hearing. Under the same section of the FAA, it decided that it could compel non-parties to comply with arbitral subpoenas for documents located in other judicial districts if the subpoenas were properly served pursuant to Federal Rule of Civil Procedure 45. The Court also decided that the subpoenas had been signed by the arbitrators in conformity with the FAA.

At the request of the parties during oral argument, the Court did not decide the defendants' objections to the subpoenas

regarding overbreadth and protection of confidential information. Instead, it ordered the parties to resolve those objections on or before December 6, 2002. The Court stated that the December 6 date was chosen to allow the defendants time to appeal and seek a stay of its decision.

The defendants did not appeal the Court's November 27 order. The parties notified the Court on December 5, 2002, that they could not resolve the remaining objections to the subpoenas. On December 17, 2002, the Court issued a second order. It ordered the parties to submit their confidential client lists to a third party of their choosing. It then ordered the defendants to turn over material to the plaintiff regarding those clients the third party found on both lists. The terms of this order were that the first step of compliance occur on or before December 27, 2002 and the second step on or before January 7, 2003.

On December 24, 2002, the Court received a fax from the defendants stating ***(1)*** that defendants and plaintiff had reached an agreement to push back compliance with the first step of the Court's December order from December 27, 2002 to January *6,* 2003; and (2) that the defendants would submit a stipulation regarding said agreement to the Court by December **30**, 2002.

The defendants filed their motions to stay on January

3, 2003. During a telephone conference among the parties and the Court on January 7, 2003, the plaintiff agreed that the defendants could turn over documents seven days after this Court ruled on the defendants' motions to stay.

11. Analysis

A court can exercise its discretion to modify, suspend, grant **or** restore an injunction during the pendency **of** an appeal **of** the court's final judgment that grants, dissolves or denies an injunction. Fed. R. Civ. **P.** 62(c).

This Court's November and December orders **do** not involve an injunction. The defendants argue that Rule 62(c) also applies to orders which have the effect of injunctive relief, such as this Court's orders directing the defendants to produce certain documents. Hay does not argue to the contrary.

The Court must consider four factors when determining whether a stay of its order is appropriate under Rule 62(c): **(1)** whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; **(3)** whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Hilton V. Braunskill, **481 U.S.** 770, 776 (1987); Wright, Miller & Kane,

Federal Practice and Procedure: Civil 2d § 2904 (citing Hilton).

If the moving party demonstrates a substantial likelihood of success on the merits upon appeal and the balance of equities favor it, the Court should grant the stay.

A. Analysis of the Hilton Factors

1. Strength of Showing of Success on Appeal

Defendants argue that they have a reasonable likelihood of success on the merits because there is no Third Circuit authority directly addressing the subject of the defendants' appeal – the power of arbitrators to order pre-hearing production of documents from third parties, and authority from other Circuits supports their position.[1]

The defendants primarily rely on Comsat Corp. v. National Science Foundation. 190 F.3d 269 (4th Cir. 1999). That case involved a non-party subpoena for deposition testimony and documents. The Cornsat court held that Section 7 of the FAA did not authorize arbitrators to order non-parties either to appear at depositions or to provide litigating parties with documents during pre-hearing discovery. Id. at 275.

[1] The Court notes that the defendants must make a strong showing, not just have a reasonable likelihood, of success on the merits in order to prevail on this factor.

The Comsat court, however, did allow arbitration subpoenas for documents from non-parties when a party has a "special need" for the documents. Id. at 276. It created this exception to allow parties in complex arbitration cases to review relevant evidence prior to the hearing so the hearing could be conducted efficiently. Id.

The result reached by this Court is similar to the result reached by the Fourth Circuit in Comsat. The difference is that the Fourth Circuit would require a party to an arbitration to show a \'special need" for the documents pre-hearing. If Section 7 of the FAA is flexible enough to allow for pre-hearing production in a "special need" situation, it is flexible enough to allow for pre-hearing production of documents when the arbitrators believe that it is appropriate without the federal court holding a hearing to determine "special need" in every case.

The Eighth Circuit and several district courts have reached the same conclusion. Security Life Ins. Co. et al. v. Duncanson & Holt et al., 228 F.3d 865, 870-71 (8th Cir. 2000); Douglas Brazell v. American Color Graphics, 2000 U.S. Dist. LEXIS 4482 at *8-9 (S.D.N.Y.Apr. 7, 2000); Integrity Ins. Co. v. American Centennial Ins. Co., 885 F. Supp. 69, 73 (S.D.N.Y. 1995); Meadows Indem. Co. Ltd. v. Nutmeq Ins. Co., 157 F.R.D. 42,

45 **(M.D.** Tenn. **1993).** The Court's decision is consistent with these cases.

2. Possibility of Irreparable Injury to Applicants

The defendants argue that they will be irreparably harmed by handing over documents regarding their clients to Hay Group, a competitor. The Court finds that there is no likelihood of competitive injury to the defendants because the Court, in its December order, safeguarded sensitive information **by** ordering client information to be examined by a neutral third party, narrowly tailored the information to be given to the plaintiff, and required a confidentiality order to govern all material given.

In Rubin et al. v. **U.S.**, 524 U.S. **1301 (1988)** (Rehnquist, Circuit Justice), the Office of the Independent Counsel filed a motion to compel some officers of the Secret Service to testify before a federal grand jury concerning information obtained by the agents in connection with their provision of protection to the President of the United States. The District Court granted the motion and the Court **of** Appeals for the District of Columbia affirmed. Chief Justice Rehnquist denied an application for a stay. Chief Justice Rehnquist acknowledged that there may be some harm caused by the interim

the subpoena; but found that it would not be irreparable. 'If the Secretary's claim of privilege is eventually upheld, disclosure of past events will not affect the President's relationship with his protectors in the future." Id.

In this case, the only possible harm to these defendants is that they will have to produce documents they would rather not have to give to Hay. As stated earlier, the Court's order will prevent any competitive injury to the defendants. See Anderson v. Government of the Virgin Islands et al., 947 F. Supp. 894, 902 (D.V.I. 1996) (limitation of agency's surveillance operations not irreparable harm because court crafted order to intrude on agency's operations as little as possible).

Nor does the Court find irreparable harm merely because the defendants' appeal may be mooted. In Republic of the Philippines et al. v. Westinghouse Electric Corp. et al., 949 F.2d 653, 658 (3d Cir. 1991), the Third Circuit Court of Appeals held that although the fact that the decision on a stay may be dispositive of the appeal in some cases is a factor that an appellate court must consider, "that alone does not justify pretermitting an examination of the nature of the irreparable injury alleged and the particular harm that will befall the appellant should the stay not be granted." The Court has examined the particular harms alleged in this case and has found

no irreparable harm.

3. Possibility of Substantial Injury to the Plaintiff

The plaintiff argues that a stay will harm its interests in the underlying arbitration. Because the Third Circuit is likely to take several months to rule on this appeal, Hay argues that a stay will either (1) continue to delay the arbitration, further thwarting its expeditious commencement, or (2) force Hay to go forward with the hearing without receiving documents in response to its subpoenas.

The Court agrees that a stay would work a substantial injury to the plaintiff. The plaintiff served these subpoenas in July 2002. The arbitration, that was filed in February 2000 and scheduled for December 18, 2002, has been put back indefinitely because of these discovery disputes. The equities favor the plaintiff here.

4. Public Interest in Denying or Granting the Stay

The defendants argue that the public interest lies in the complete adjudication of its appeal before the Third Circuit. Hay argues that the public interest lies in its ability to proceed with the arbitration expeditiously. This factor is neutral.

B. Conclusion

Weighing each **of** the factors, the Court concludes that the defendants have not met their burden of demonstrating that there is a substantial likelihood of success on the merits upon appeal or that the balance **of** equities favor granting a stay.

An appropriate order follows.

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ORDER

AND NOW, **this** 4th *day* **of** March, 2003, upon consideration of Defendants' Motions to Stay Certain Portions of the **Court's** December **17,** 2002 Order Pending Appeal (Docket Nos. 27 and 28), the Plaintiff's Opposition to the motions and the Defendants' Replies to the Opposition, it is hereby Ordered that said motions are Denied.

BY THE COURT:

Mary A. McLaughlin

MARY A. MCLAUGHLIN, J.